(2) 90-1237

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1990

DANA HERBERT THEIS,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

DID THE NORTH CAROLINA COURT OF APPEALS VIOLATE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT WHEN IT HELD THAT PETITIONER HAD NO RIGHT TO APPEAL FROM AN INTERLOCUTORY ORDER ENTERED IN A CRIMINAL CASE?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of North Carolina, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the North Carolina Court of Appeals' unreported decision in this case.

STATUTES AND RULES INVOLVED

N.C.G.S. § 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict and without limitation as to time.

(a) At any time after verdict, the defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section.

(b) The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:

. . .

(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.

N.C.G.S. § 15A-1442. Grounds for correction of error by appellate division.

The following constitute grounds for correction of errors by the appellate division.

. . .

(5) Constitutionally Invalid Procedure or Statute; Prosecution for Constitutionally Protected Conduct. --

a. The conviction was obtained by a violation of the Constitution of the United States or of the Constitution of North Carolina.

Rule 21, North Carolina Rules of Appellate Procedure:

RULE 21. CERTIORARI

(a) Scope of the Writ.

(1) *Review of the Judgments and Orders of Trial Tribunals.* The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review

pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

STATEMENT OF THE CASE

On 2 November 1987, in North Carolina Superior Court, petitioner was tried on six charges of dissemination of obscenity and six charges of possession with intent to disseminate obscenity. On 10 November 1987, the superior court declared a mistrial because the jury hearing the case was hopelessly deadlocked. On 24 April 1989, petitioner made a motion to dismiss the charges against him on the grounds that a retrial would violate his double jeopardy rights. The superior court denied this motion, whereupon petitioner gave notice of appeal in open court. Respondent objected to the petitioner's giving notice of appeal, arguing that the denial of a pretrial motion to dismiss based on double jeopardy grounds is an interlocutory matter that is not subject to appeal. Notwithstanding the respondent's objections, the superior court allowed petitioner to give notice of appeal.

On 21 July 1989, petitioner filed the record on appeal in this case with the Office of the Clerk of the North Carolina Court of Appeals. On 16 August 1989, respondent filed a motion to dismiss the defendant's appeal on the grounds that interlocutory orders in criminal cases are not appealable. On 24 August 1989, the Court of Appeals entered an order referring the respondent's motion to the panel to which the case was assigned. On 28 August 1989, respondent filed a motion to expedite the ruling on respondent's motion to dismiss, arguing that to delay the ruling would cause limited resources to be unnecessarily expended on a case that should not be on appeal. On 29 August 1989, this motion was denied.

On 1 September 1989, petitioner filed a brief in the Court of Appeals arguing (1) that the evidence at trial was insufficient to support a guilty verdict and that therefore the trial court erred in overruling petitioner's motions to dismiss made at trial and (2) that since the evidence at trial was insufficient to support a guilty verdict, the trial court erred on 24 April 1989 when it denied petitioner's motions to dismiss based upon double jeopardy grounds. On 3 October 1989, respondent filed its brief responding to petitioner's contentions. In this brief, respondent reaffirmed its position that petitioner's appeal was improperly allowed; yet, in the interest of efficient administration of justice, respondent withdrew its motion to dismiss petitioner's appeal and requested that the court rule on the issue of the sufficiency of the respondent's evidence at the first trial.

On 5 June 1990, the Court of Appeals filed a decision in this case holding that North Carolina statutes do not provide for interlocutory appeals in criminal cases. On its own motion, the Court of Appeals dismissed petitioner's appeal. On 8 November 1990, the Supreme Court of North Carolina refused to review the decision of the Court of Appeals.

REASON FOR DENYING THE WRIT

The petition for a writ of certiorari does not present a substantial federal question.

The petition seeks this Court's determination of only one question: Did the North Carolina Court of Appeals violate the equal protection and due process clauses of the Fourteenth Amendment when it held that petitioner had no right to bring an interlocutory appeal in a criminal case? In evaluating this petition, it is important to note the issues the petitioner does <u>not</u> raise.

The petition does not ask this Court to review the constitutionality of the North Carolina statutes governing appellate review in criminal cases -- no doubt because there is no colorable constitutional problem with those statutes. N.C.G.S. § 15A-1441 *et seq*. The United States Constitution does not require a state to provide any (or any particular) scheme of appellate review, although of course if the state does adopt such a scheme any differentiation among litigants' ability to seek review must have a rational basis. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972). The North Carolina statutes make no distinction among criminal defendants' appeal rights that is of relevance to the present case, and petitioner does not contend otherwise.

The petition does not assert or even suggest that a state procedural rule is being used to bar or impede petitioner's presentation of any federal constitutional claim. *Cf. Ford v. Georgia*, __ U.S. __, 111 S.Ct. 850, 856-858 (1991) (discussing circumstances under which state procedural rule can bar consideration of federal question). Petitioner's double jeopardy argument has already been addressed (and rejected) on the merits by the state superior court. If the petitioner is convicted he can raise the argument in a motion for appropriate relief, N.C.G.S. §15A-1415(a) and (b)(3) (motion available at any time after trial to challenge conviction obtained in violation of United States Constitution), and on appeal, N.C.G.S. §15A-1442(5)(a) (appellate review available for conviction allegedly obtained in violation of United States Constitution). North Carolina law, furthermore, permits petitioner to seek interlocutory appellate review of his double jeopardy claim by writ of certiorari. N.C.R.App.P. 21(a)(1).

The petition does not seek this Court's consideration of any claim that the double jeopardy prohibition of the Fifth and Fourteenth Amendments requires a state to allow interlocutory appellate review of the denial of a pre-trial motion to dismiss

premised on that prohibition. *Cf. Abney v. United States*, 431 U.S. 651, 653, 659, (1977) (holding that order denying motion to dismiss on double jeopardy grounds is "final decision" under 28 U.S.C. §1291).

The petition does not allege that the decision of the Court of Appeals should be subject to heightened scrutiny because it was the product of invidious prejudice based on race, national origin, sex, religion or some other similar ground. Petitioner's statement that the Court of Appeals "invidiously discriminated" against him, Petition for Writ of Certiorari, p. 11, is wholly conclusory.

The sole basis on which petitioner asks this Court to grant a writ of certiorari is his observation that the Court of Appeals dismissed his interlocutory appeal although other panels of that court had entertained similar appeals in earlier cases. The petition asserts that this inconsistency in the decisions of the North Carolina Court of Appeals amounted to arbitrary discrimination against petitioner. An examination of several pertinent decisions of the Court of Appeals demonstrates that petitioner's assertion is without merit.

Whether a defendant may appeal an interlocutory denial of a motion to dismiss based on double jeopardy grounds is a question that has produced conflicting decisions in the Court of Appeal in recent years. The question was answered in the negative by a majority of the panel in *State v. Jones*, 67 N.C. App. 413, 313 S.E.2d 264 (1984). Rejecting the defendant's contention that *Abney v. United States*, 431 U.S. 651 (1977) stands for the proposition that "an appeal from the denial of a motion based on double jeopardy must be litigated to completion before a second trial may begin," *Jones*, 67 N.C. App. at 415, 313 S.E.2d at 266, the majority held that N.C.G.S. § 7A-27 and N.C.G.S. § 1-277, "taken together, provide that no appeal lies to an appellate court

from an interlocutory order unless such order deprives the appellant of a substantial right which he would lose if the order is not reviewed before final judgment." *Jones*, 67 N.C. App. at 415, 313 S.E.2d at 266 (citations omitted). The majority then reasoned that since the appellant had the right to petition the appellate courts for a prerogative writ pertaining to his double jeopardy contentions, he would not be deprived of a substantial right by being prevented from appealing the trial court's denial of his motion to dismiss. Dissenting to this holding, Judge Johnson concluded that an order denying a motion to dismiss based on double jeopardy grounds is immediately appealable because, according to Judge Johnson, such an order affects a substantial right, that being "the right not to be subjected to a rehearing or retrial, a right guaranteed by [the federal and state] constitutions." *Id.* at 418, 313 S.E.2d at 267.

Adopting the reasoning of Judge Johnson's dissent in *Jones*, a unanimous panel in *State v. Montalbano*, 73 N.C. App. 259, 326 S.E.2d 634, *disc. rev. denied, appeal dismissed*, 313 N.C. 608, 332 S.E.2d 182 (1985), held that despite being interlocutory, an order denying a motion to dismiss based on double jeopardy grounds is appealable because "it potentially concerns a 'substantial right,' that of the defendant not to be put to trial twice for the same offense." *Id.* at 260, 326 S.E.2d at 635. In *State v. Major*, 84 N.C. App. 421, 352 S.E.2d 862 (1987), a unanimous panel that included two judges from the *Montalbano* panel concurred with the *Montalbano* holding.

Declining to follow *Montalbano* and *Major*, the panel in *State v. Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988), *cert. denied*, 324 N.C. 115, 377 S.E.2d 241 (1989), dismissed the defendant's appeal of an interlocutory denial of a motion to dismiss based on double jeopardy grounds and held that a denial of the defendant's motion to dismiss was a "non-appealable interlocutory order rendered in a criminal proceeding." 92 N.C.

App. at 204, 374 S.E.2d at 133. The panel in *Joseph* relied on the *per curiam* decision in *State v. Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986), a decision in which the Supreme Court of North Carolina held that "there is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case." *Id.* at 409, 348 S.E.2d at 593 (citation omitted). The panel in *Joseph* reasoned that (1) because the right to appeal in a criminal case is not a federal constitutional right but rather is a statutory right, and (2) because the *Henry* decision makes clear that no North Carolina statute provides for a right of appeal from an interlocutory order in a criminal case, the "sustantial right" analysis used in cases such as *Montalbano* and *Major* was irrelevant to interlocutory appeals in criminal cases. In effect, the *Joseph* decision overruled *Montalbano* and *Major* and properly brought the Court of Appeals in line with the holding of the Supreme Court of North Carolina in *Henry*.

Petitioner cites *State v. Johnson*, 95 N.C.App. 757, 383 S.E.2d 692 (1989), to support his claim that the decisions of the Court of Appeals on interlocutory criminal appeals continue to be inconsistent and arbitrary. Petitioner plainly misstates the holding in *Johnson*. In that case the appellant entered into a plea bargain with the State and was sentenced accordingly. Subsequent to sentencing, the State successfully moved to have the judgment vacated and the original charges against the appellant reinstated. In allowing an appeal from the Superior Court's vacation of the judgment, the Court of Appeals stated that "[t]his appeal is not interlocutory" because the Superior Court order was, as a matter of North Carolina law, a final (and appealable) judgment. *Id.* at 758. *State v. Johnson* simply is irrelevant to petitioner's argument.

Far from being the product of an inexplicable and irrational exercise of discretion, the decision below was a straightforward application of the interpretation of the state laws concerning interlocutory criminal appeals adopted by the Court of Appeals in *State v. Joseph*. The existence of disagreement over the correct interpretation of those laws prior to *Joseph*, as *Joseph* itself explained, stemmed from divergent constructions of a change in a relevant statute. *State v. Joseph*, 92 N.C.App. at 205-06. The fact that panels made up of different appellate judges sometimes reach divergent views of the law violates no constitutional principle. *Cf. Valtsakis v. C.I.R.*, 801 F.2d 622, 624 (2d Cir. 1986). At most, petitioner's argument shows that some decisions of the North Carolina Court of Appeals were erroneous interpretations of North Carolina law. This Court rejected the attempt to define as an equal protection violation a state court's mistakes in applying state law many years ago.

> Such misapplication cannot be shown to be an invidious discrimination. We have said time and time again that the Fourteenth Amendment does not "assure uniformity of judicial decisions ... [or] immunity from judicial error ... ."

Beck v. Washington, 369 U.S. 541, 554-55, (1962) (citation omitted).

CONCLUSION

The petition for a writ of certiorari in the present case raises no federal question of substance and should be denied.

Respectfully submitted,

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